Supreme Court, U.S.
FILED

981293 DEC 3 - 1998

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1998

THOMAS J. SULLIVAN,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD

30PP

QUESTIONS PRESENTED

1. Assuming that trial counsel did not object to government expert testimony establishing an erroneous basis for criminal liability, is this instance of ineffective assistance of counsel sufficient to show denial of a federal right so to entide the Petitioner to a certificate of appealability?

LIST OF PARTIES

Petitioner: Thomas J. Sullivan

Respondent: United States of America

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CITATION TO THE UNOFFICIAL REPORTS

The order denying the certificate of appealability appears in the unpublished reports of the Fifth Circuit as *United States v. Thomas J. Sullivan,* No.98-10209 (5th Cir. July 28, 1998 and September 4, 1998).

JURISDICTIONAL BASIS

On July 28, 1998, a judge of the Fifth Circuit entered an order denying Petitioner's request for certificate of appealability and dismissed the appeal. Petitioner filed his motion for reconsideration August 11, 1998. The Court denied this motion by order dated September 4, 1998. This petition for writ of certiorari is timely filed before December 3, 1998.

Petitioner believes 28 U.S.C. 1254 (1) confers jurisdiction on this Court to review the decision of the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence."

28 U.S.C. 2253 (c) (1) (B) provides:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to a court of appeals from-the final order in a proceeding under section 2255.

28 U.S.C. 2253 (c) (2) provides:

A certificate of appealability may issue under paragraph (1) only if the accused has made a substantial showing of a denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner filed his motion to vacate sentence under 28 U.S.C. 2255 contending in part that his trial counsel had

been ineffective by failing to object to government testimony about the application of Financial Accounting Standards Board 66 and thus permitting his conviction on an improper legal theory and on conduct that was not a crime. The trial court denied and dismissed the motion and further denied the certificate of appealability.

The court of appeals also declined to grant a certificate of appealability, holding that Petitioner had not shown prejudice in his ineffectiveness claim.

Petitioner was chairman of the board of Tristar Capital Corporation; co-defendant Mickey Sallee was chairman of San Angelo Savings. In 1985, so contended the government, San Angelo could not meet its reserve requirements due to carrying real estate owned. Financial institutions were required to increase their net worth by a percentage of the value of real estate owned. Real estate owned is a non-0earning asset that in turn depletes an institution's reserves.

At trial the government contended that San Angelo, troubled with the reserve requirement and Tristar, having its own cash flow problems, devised a scheme to cure their mutual problems through the sale of San Angelo's real estate owned.

Thus, according to the government, Petitioner and Sallee arranged for San Angelo to extend loans to borrowers in return for the borrowers purchasing the real estate owned. By this Petitioner and Sallee sought artificially to enhance the financial appearance of San Angelo. This was done by recording an improper profit on the sale of real estate owned. Government witnesses (an auditor and director of San Angelo) testified that Financial Accounting Board Standard 66 would not allow the institution to record a gain on 100% financing of the sale of the real estate owned by the institution.

At the heart of the government's case was that San Angelo had regulatory capital problems from its real estate

owned and needed to unload this property to prevent worse problems. The accounting treatment of the real estate owned sale, if it violated FASB 66, made the resulting profit declaration invalid and supplied the necessary illegality.

Petitioner's trial counsel did not object to this testimony, nor did he offer any contrary testimony of the applicability of FASB 66.

The court of appeals denied Petitioner's request for certificate of appealability, holding that Petitioner had failed to show prejudice on this ineffectiveness claim.

REASONS FOR GRANTING THE WRIT

The reasons for granting this writ are that the court of appeals' decision denying Petitioner's request for certificate of appealability is both contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and the Fifth Circuit's own recent precedents.

Did the court of appeals err in holding that Petitioner had failed to make a substantial showing of denial of a constitutional right by failing to show prejudice in his ineffective assistance of counsel claim?

Under the test of *Strickland v. Washington,* 466 U.S. 668 (1984), to show ineffective assistance of counsel, the defendant must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Prejudice under *Strickland* requires that the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome and an assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like. 104 S. Ct. 2068. A defendant need

not however, show that counsel's deficient conduct more likely than not altered the outcome of the case. *Id.*

The government's theory of criminality was that Petitioner and his co-defendant improperly recorded a profit on this transaction illegally to enhance the appearance of the financial condition of San Angelo. The proof of the illegality came from FASB 66. But in *United States v. Schnitzer,* 145 F.3d 721, 729-730 (5th Cir. 1998), the court held that FASB 66 did not apply to a 1986 transaction (FASB 66 did not apply to the savings and loan industry until 1989); under the Regulatory Accounting Principles then in effect, a bank could sell its real estate holdings, finance 100% of the purchaser's loan, and book a profit at the inception of the loan. *See United States v. Baker,* 61 F.3d 317, 321 (5th Cir. 1995). Accordingly this theory of criminality is contrary to law because it is based on an erroneous view of the applicable federal regulations. 145 F.3d 730.

The transactions herein occurred in 1985, well before application of FASB 66; San Angelo's profit declaration in this case was perfectly legal and the government's theory was contrary to law.

If the government's theory of criminality was contrary to the established law, and the transaction itself not illegal, the failure to object to this theory when it came before the court through government testimony was an unprofessional error.

In this case the finding of an unprofessional error virtually solves the question of prejudice. The Fifth Circuit has held that if a business transaction is within the range of "value-for-value," that is, if each party to the transaction gives value and receives value in return, the transaction is not fraudulent. *United States v. Beuttenmuller,* 29 F.3d 973 (5th Cir. 1994); *United States v. Schnitzer,* 145 F.3d 731-737. If recording a profit in this case was not illegal, and the transactions were in the range of value-for-value (a

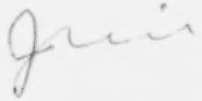
position not really advanced by the government) then there was no illegality and Petitioner was convicted on a completely improper legal theory. This is certainly enough to undermine confidence in the outcome. Indeed, if an error permitting a client to be convicted improperly is not prejudice, how will any defendant show prejudice on ineffective assistance?

The only appreciable difference between Schnitzer's and Petitioner's cases is the difference between having to hear an appeal and discretionary (at least to some degree) jurisdiction. If Schnitzer's counsel had not raised the FASB 66 issue, he would have been ineffective with prejudice, as obviously his objections caused a reversal of Schnitzer's case and acquittal on some of the counts.

This case has not yet gone to full briefing and oral argument. Petitioner submits that the appropriate result in this case is for this Court to vacate the order denying the

certificate of appealability and let the matter proceed normally through the appellate process.

Respectfully submitted,



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COUNSEL OF RECORD

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Appendix A — Appeal from the United States District Court for the Northern District of Texas Filed July 28, 1998. 1a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10209
USDC No. 3:97-CV-966-G

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS J. SULLIVAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Thomas J. Sullivan requests that this court issue a certificate of appealability ("COA") so that he may appeal the district court's denial of his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Sullivan challenges his conviction on the grounds that witnesses

should not have been allowed to testify regarding Standard 66 of the Financial Accounting Standards Board ("FASB"), that counsel was ineffective in failing to object to this testimony, and that his conviction violated *United States v. Gaudin*, 515 U.S. 506, 513 (1995).

Sullivan's FASB 66 and Gaudin challenges are procedurally barred. *See United States v. Shaid*, 937 F.2d 228, 232 (5th Cir.1991) (en banc). Sullivan has made no showing that he was prejudiced by his counsel's alleged deficiency; thus, his ineffective-assistance claim fails. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Sullivan has failed to make a substantial showing of the denial of a constitutional right, and COA is therefore denied. 28 U.S.C. § 2253 (c) (2); *Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997). COA DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10209

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS J. SULLIVAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas, Dallas

Before HIGGINBOTHAM, JONES AND DENNIS, Circuit Judges.

BY THE COURT:

A member of this panel has previously denied appellant's motion for certificate of appealability. After consideration by this panel upon request of appellant, IT

IS ORDERED that appellant's petition for panel rehearing treated as motion for reconsideration is denied.